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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 In re LENOVO ADWARE LITIGATION

Case No. 5:15-md-02624-RMW

12
13 This Document Relates To:

14 ALL ACTIONS

CLASS ACTION

15 PLAINTIFF JOEL FOSTER'S
16 RESPONSE TO MOTIONS FOR
17 APPOINTMENT OF INTERIM CLASS
18 COUNSEL

19 Date: July 17, 2015
20 Time: 9:00 a.m.
21 Courtroom: 6 – 4th Floor
22 Judge: Hon Ronald M. White
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INTRODUCTION

This case concerns “the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (J. Brandeis, dissenting). While Justice Brandeis’ dissent in *Olmstead* concerned privacy from the United States government, that right has been expanded by Congress through statutory enactments applicable to the case at bar. As has been thoroughly discussed by the early filings in this case, the instant matter is a large consumer class action, yet another entry in the growing realm of consumer privacy cases. The class is nationwide and voluminous. The highly technical nature of the underlying issues and facts require counsel with demonstrated expertise in similar matters.

Four motions have been filed by competing firms seeking leadership. Each motion is advanced by impressive, capable attorneys; but, of the four motions, Robbins Geller and Edelson’s stands out above the rest. The firm making the present response on behalf of Plaintiff Foster did not submit any of these four motions, but feel compelled at this juncture to argue to this Court for Robbins Geller and Edelson to be appointed interim lead counsel. Plaintiff Foster strongly urges appointment of Robbins Geller and Edelson because that most likely will lead to a successful resolution of the claims herein, be it by settlement or trial.

The other firms competing for appointment clearly have demonstrated track records of success. However, not every firm has a demonstrated track record of success in consumer privacy litigation of this magnitude. Surely, these other firms would be well suited to be lead counsel in other matters. But the Class must have the advantage of having the best possible lead counsel for this matter specifically.

Robbins Geller and Edelson have conducted an impressive pre-filing investigation that likely saved substantial early discovery, and have openly shared that information with other firms. Robbins Geller and Edelson have also developed a rapport with counsel for the Defendants; in fact, had other firms agreed, the Class already would have had the advantage of an early mediation. This would have provided an opportunity to learn the Defendants’ position on various matters, as well as giving the Class an early opportunity to settle, while keeping

1 transactional costs low. Even had the mediation not produced an early settlement, the
 2 information about the parties' positions on central issues would have been valuable, and the
 3 expense relatively negligible. Without casting aspersions on any other firms, as we have no
 4 reason to believe any other firms are acting in anything less than good faith, attorneys for
 5 Plaintiff Foster do not believe that passing up this opportunity inured to the benefit of the Class.

6 For the reasons more fully set forth in Robbins Geller and Edelson's leadership motion
 7 and the present memorandum, given those two firm's unmatched experience in privacy and
 8 technology related lawsuits, their unparalleled record of results, and their demonstrated
 9 commitment to this case, Plaintiff Foster respectfully submits that Robbins Geller and Edelson's
 10 request that they be appointed Interim Co-Lead Class Counsel should be granted by this Court.

11 **BRIEF FACTUAL AND PROCEDURAL BACKGROUND**

12
 13 Plaintiff Joel Foster is a citizen of the Commonwealth of Kentucky who purchased a
 14 Lenovo Yoga2 Pro laptop during the class period. (*Foster* Dkt. 1, ¶ 11). On March 11, 2015,
 15 Mr. Foster filed a class action suit alleging violations of the Electronic Communications Privacy
 16 Act, 18 U.S.C. §§ 2510-22, the Stored Communications Act 18 U.S.C. § 2701, *et. seq.*, the
 17 Kentucky Consumer Protection Act, KRS § 367, *et. seq.*, and for various forms of common law
 18 relief. (*Foster* Dkt. 1, ¶¶ 58-91). Foster's class was consolidated by the MDL panel, and
 19 transferred to the Northern District of California on June 8, 2015. (*In re Lenovo Adware*
 20 *Litigation*, Dkt. 1).

21 All of the consolidated actions are believed to arise from the same course of conduct
 22 engaged in by the Defendants Lenovo and Superfish. Superfish's Visual Discovery software
 23 was installed on millions of Lenovo's computers; the majority of these computers landed in the
 24 hands of ordinary American consumers. (*Foster* Dkt. 1, ¶¶ 16-18). This has given the
 25 Defendants the ability to monitor, intercept, and utilize millions of communications on a daily
 26 basis.

27 To make matters worse, this software has created an additional grave security risk for
 28 consumers, as it has the capability of intercepting and decrypting secure requests from

HyperText Transfer Protocol Secure (“HTTPS”) websites. This negates critical security features of banking, tax, remote desktop, and many government websites, further exposing consumers to attack. (*Id.* Dkt. 1 ¶ 17).

On June 23, 2015, Plaintiffs’ counsel in seven of the Consolidated Actions filed motions to be appointed interim class counsel. Pritzker Levine, LLP, Cortchett, Pitre & Levine LLP, and Girard Gibbs LLP, counsel in the *Sterling International*, *JGX*, and *Estrella* actions, filed to be appointed interim co-lead counsel. Block & Leviton, LLP and Van Laningham Duncan PLLC, counsel in the *Wood* action, filed to be appointed, while the Joseph Saveri Law Firm, Inc., counsel in the *Babbitt* action also filed to be appointed. Robbins Geller and Edelson, counsel in the *Pick* and *Hunter* actions also have filed for appointment as interim co-lead counsel.¹

ARGUMENT

“Federal Rule of Civil Procedure 23(g)(3) authorizes district courts to designate interim counsel to act on behalf of a putative class before the final certification decision is made.” *Flores v. Velocity Express, Inc.*, 2013 U.S. Dist. LEXIS 77821, *29 (N.D. Cal. June 2, 2013). Moreover, “[i]n the absence of agreement between all involved counsel, the Court must itself endeavor to select counsel best able to represent the interests of the purported class.” *Four in One Co. v. SK Foods, L.P.*, 2009 U.S. Dist. LEXIS 28657, *11 (E.D. Cal. Mar. 19, 2009).

When deciding between the competing firms, the Court should consider four factors: “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.” *Flores*, 2013 U.S. Dist. LEXIS at 29.

The Foster attorneys have reviewed all four motions filed by all of the potential leadership firms, in which motions those firms have explained their credentials and positions. Friend Decl. ¶ 4. On review of all of the motions, the choice seems clear: Robbins Geller and

¹ For the sake of brevity and consistency, the firms seeking appointment as interim co-lead counsel will be referred to collectively hereinafter as “the competing firms.”

Edelson are the best suited, best situated, and best choice to be interim lead counsel in this matter.

I. Robbins Geller and Edelson are Uniquely Qualified to be Appointed Interim Lead Counsel Due to Their Experience in Similar Matters

Again, there is no doubt that all of the firms who have moved for appointment as interim class counsel are highly accomplished. However, selecting interim class counsel is not simply a matter of looking at who has the most impressive resume in the abstract; in a case such as this, each firm is impressive. Rather, interim class counsel must be selected based upon who among these quality contenders is “best able to represent the interests of the purported class.” *Four in One Co.*, 2009 U.S. Dist. LEXIS at 11.

In the *Four in One* litigation, an anti-trust class action, Judge Morrison C. England Jr. appointed Quinn Emanuel and Hausfeld LLP to be interim lead counsel out of multiple, well-qualified suitors. *Id.* at 14. In doing so, Judge England noted the following about the Quinn Emanuel firm:

Significantly, too, the firm, and in particular Stephen Neuwirth, one of the attorneys proposed as a member of its representational team for this litigation, currently serves as co-lead interim counsel for direct purchase plaintiffs in both *In re Rail Fuel Surcharge Antitrust Litigation* (MDL 1869 (D.D.C.) (which involves purported anticompetitive conduct in connection with fuel surcharges assessed by the nation's four largest railroads) and *Universal Delaware Inc., et al. v. Comdata Corp.*, Civ. No. 07 1078 [13] (JKG (HSP (E.D. Pa.), an action alleging antitrust violations in the market for credit cards utilized by truck fleets at truck stops. Quinn Emanuel's combination of significant trial experience, experience in representing class action plaintiffs in analogous antitrust litigation, and its nationwide resources make it stand out in this Court's estimation after application of the Rule 23(g) factors enumerated above.

Id. at 13.

Judge England concluded that this specific related experience made Quinn Emanuel “stand out from the rest with regard to qualifications particularly applicable to [the] case.” *Id.* at 14. This is also the circumstance with the Robbins Geller and Edelson firms in the instant matter.

1 Robbins Geller and Edelson's history in consumer privacy and technology class actions,
2 documented in their motion, is compelling. Since a decade ago, in 2005, when this area of law
3 was in its nascent stages, Robbins Geller has a chronicled history of excellence in this arena.
4 Foster will highlight two of them here.

5 In the case of *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. Fla. 2005),
6 Robbins Geller succeeded in overturning an adverse ruling at the District Court level in the
7 Eleventh Circuit, where a unanimous panel ruled that a "plaintiff need not prove actual damages
8 to recover liquidated damages for a violation of the DPPA." In *Kehoe* the defendant purchased
9 the names and addresses of all individuals who had registered a vehicle less than three years old
10 with the Florida DMV in Palm Beach, Martin, and Broward Counties. Over three years, the
11 defendant purchased the names and addresses of roughly 565,600 citizens. *Id.* at 1210-1211.
12 The defendant then sent mass solicitations to those individuals, violating their privacy. *Kehoe*
13 was settled for \$50 million dollars.

14 Another notable success was the case of *In re Sony Gaming Networks & Customer Data*
15 *Sec. Breach Litig.*, 903 F. Supp. 2d 942 (S.D. Cal. 2012). In that case, Robbins Geller was co-
16 lead counsel. The *Sony Gaming* litigation resulted from hackers exploiting a problem in Sony's
17 security, which allowed the hackers to access sensitive information of individuals using Sony's
18 online gaming networks. *Id.* at 950-951. Sony sought dismissal of the claims on Article III
19 standing grounds, arguing that, although sensitive information was compromised, the plaintiffs
20 could not show how, or if, their personal information was actually used or seen by hackers. *Id.*
21 at 957. The court rejected *Sony's* arguments, agreeing with the arguments advanced for the
22 class that the risk of future harm conferred standing. *Id.* at 958.

23 The holding in *Sony Gaming* has been recognized as an important ruling for privacy
24 law. In an article appearing in Law360, Pepper Hamilton privacy attorney Jeffrey Vagle noted
25 that "[a] few years ago, the plaintiffs likely wouldn't have gotten past the standing stage."
26 Allison Grande, *Sony Breach Ruling Provides Opening For Plaintiffs Bar*, Law360 (Jan. 22,
27 2014), available at [http://www.law360.com/articles/503008/sony-breach-ruling-provides-](http://www.law360.com/articles/503008/sony-breach-ruling-provides-opening-for-plaintiffs-bar)
28 opening-for-plaintiffs-bar. Mr. Vagle noted that courts were coming around to the proposition

1 that a data breach alone can confer standing on a plaintiff in the right circumstances. This is in
 2 no small part due to the work of firms who specialize in the area, such as Robbins Geller.
 3 Having a firm in the interim lead that has fought these battles and won would confer a
 4 substantial benefit on the class.

5 Edelson is similarly experienced, and has enjoyed great success in this field. Particularly
 6 relevant here, Edelson was lead counsel in *Harris v. comScore*, No. 11-cv-5807 (N.D. Ill.), a
 7 class action that bears strong similarities to the instant matter. In *Harris* the defendant installed
 8 software that could access and intercept user files and communications. Accordingly, the *Harris*
 9 litigation and the *Lenovo* litigation share several causes of action. *Harris v. comScore, Inc.*,
 10 292 F.R.D. 579, 584 (N.D. Ill. 2013).

11 Eventually, Edelson led the way in *Harris* in securing a \$14 million dollar settlement
 12 that would result in cash payouts to the class. Jay Edelson himself noted that “class members
 13 will be receiving actual cash....we’re quite pleased.” Andrew Scurria, *ComScore Pays \$14M*
 14 *To Escape Massive Privacy Class Action*, Law360 (June 4, 2014), available at
 15 [http://www.law360.com/articles/544569/comscore-pays-14m-to-escape-massive-privacy-](http://www.law360.com/articles/544569/comscore-pays-14m-to-escape-massive-privacy-class-action)
 16 class-action.

17 A blog entry by Ballard Spahr’s Privacy and Data Security Group noted the success of
 18 the *Harris* litigation, and its impact on the privacy field, as follows:

19
 20 The holding in *Harris v. comScore* may contribute to an already increasing
 21 number of class action privacy suits under federal law. Historically, other
 22 circuits (including the Fourth Circuit) have found that putative class members
 23 lack standing to pursue class actions where there is no evidence of actual harm.
 24 Following similar holdings in recent Ninth Circuit cases, however, the Seventh
 25 Circuit's *comScore* opinion continues a trend in finding that statutory damages
 26 under federal privacy laws are sufficient to satisfy the commonality and
 27 predominance requirements of a Rule 23(b)(3) class. Whether other circuits will
 28 join the Seventh and Ninth Circuits remains an open, and important, question.

26 Daniel A. Nadel and Philip N. Yanella, *Seventh Circuit Upholds Privacy Class Action*
 27 *under Federal Law*, Ballard Spahr, LLP, (July 24, 2013), available at

1 [http://www.ballardspahr.com/alertspublications/legalalerts/2013-07-24-seventh-circuit-](http://www.ballardspahr.com/alertspublications/legalalerts/2013-07-24-seventh-circuit-upholds-privacy-class-action-under-federal-law.aspx)
 2 [upholds-privacy-class-action-under-federal-law.aspx](http://www.ballardspahr.com/alertspublications/legalalerts/2013-07-24-seventh-circuit-upholds-privacy-class-action-under-federal-law.aspx).

3 Again this demonstrates how attorneys with expertise and experience in this area, such
 4 as the Edelson firm in the *Harris* case, have contributed greatly to a changing, more consumer-
 5 friendly landscape for privacy law in the United States. This putative class should likewise
 6 have the opportunity to benefit from such experienced leadership.

7 **II. Robbins Geller and Edelson's Work in Identifying the Class Claims, and Their**
 8 **Unique Resources, Further Demonstrate the Expertise They Can Bring to this**
 9 **Litigation.**

10 Out of all of the firms involved in this litigation, none have shown the same
 11 technological experience and acumen that the Robbins Geller and Edelson firms have
 12 demonstrated. This is further exhibited by the substantial leg work, and new-fashioned
 13 sleuthing, that was done by these firms on Lenovo's laptops.

14 The *Hunter* and *Pick* complaints were the first complaints in this matter that went
 15 beyond the "what" and into the "how." By way of example, the *Hunter* complaint was the result
 16 of an actual technical analysis of Lenovo's hardware. This gave Edelson information that the
 17 media did not have yet, and the vast majority of the class would not know, and likely saved a
 18 great deal of time and effort that would have been otherwise wasted in early discovery. Due to
 19 the fact that Edelson maintains "in-house computer forensic investigators" Edelson can provide
 20 certain critical support that no other firm in this case is likely to be able to provide. (DN 6 at
 21 15).

22 Robbins Geller, likewise, boasts uniquely relevant resources. Robbins Geller has the
 23 capability to store more than 150 *terabytes* of data. Robbins Geller could actually store the
 24 entire Library of Congress on their hard drives. Fifteen times. Catherine Armitage, *Optimism*
 25 *shines through experts' view of the future*, The Sydney Morning Herald, (March 24, 2012),
 26 *available at* [http://www.smh.com.au/national/optimism-shines-through-experts-view-of-the-](http://www.smh.com.au/national/optimism-shines-through-experts-view-of-the-future-20120323-1vpas.html)
 27 [future-20120323-1vpas.html](http://www.smh.com.au/national/optimism-shines-through-experts-view-of-the-future-20120323-1vpas.html). This kind of electronic muscle will save the putative class the
 28 expense and inconvenience of having to have offsite vendors store information, as this case
 could easily involve the production of millions of documents in any number of formats.

CONCLUSION

Robbins Geller and Edelson are the best qualified firms to represent the interests of this particular putative class, given the subject matter and size of the case. Foster respectfully requests that this Court grant Robbins Geller and Edelson's Motion for their Appointment as Interim Co-Lead Counsel.

Dated: July 7, 2015

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Email Notice List.

s/ John S. Friend
John S. Friend